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Supreme Court of the United States

October Term, 1923

No. 326

JAMES C. DAVIS, AGENT OF THE PRESIDENT, UNDER SECTION 206 OF THE TRANSPORTATION ACT, 1920,

Petitioner,

vs.

JOHN O'HARA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF FOR PETITIONER

STATEMENT

This case comes here on writ of certiorari to the Supreme Court of the State of Nebraska to review a final judgment rendered on the 21st day of February, 1923, which affirmed the judgment of the District Court of Douglas County, Nebraska, entered on the 5th day of June, 1922, upon the verdict of the jury, for $46,840.11, all in excess of $37,500.00 having been remitted (Rec., p. 203). A motion for a rehearing filed March 6, 1923, was overruled March 30, 1923 (Rec., p. 204).

The record shows:

On September 13, 1919, while the railroads were in the possession of the United States and operated by the Director General of Railroads, John O'Hara, the plaintiff,

was employed by him in the operation of the railroad of Union Pacific Railroad Company, and while so employed, suffered an injury, resulting in the loss of his eyesight, by exploding an electric blasting cap. He was a citizen and resident of Council Bluffs, Iowa, and the accident happened there. On February 9, 1920, he sued Walker D. Hines, Director General of Railroads, for his injury in the *District Court of Douglas County, Nebraska,* in violation of the plain provisions of General Order No. 18-A, which required suit to be brought in the county or district where the cause of action arose, or where the plaintiff resided at the time it accrued. On February 12, 1920, summons was served on an operating official, operating the railroad upon which the plaintiff was employed, for the Director General (Rec., p. 5). On March 8, 1920, the Director General filed the following special appearance and motion to quash the summons:

> "Comes now said defendant, Walker D. Hines, Director General of Railroads, and appearing specially and for the purpose only of objecting to the jurisdiction of the court over the person of the defendant and over the subject-matter of this action, moves the court to quash the summons herein, and as grounds therefor alleges:
>
> "That General Orders Nos. 50, 50-A, 18, 18-A and 18-B, issued by the Director General of Railroads, copies of which are hereto attached, marked Exhibits 'A', 'B', 'C', 'D' and 'E', respectively, and made a part hereof, provide that all suits against the Director General of Railroads as authorized by General Order No. 50-A must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose; defendant further alleges that the plaintiff, at the time of the accrual of his pretended cause of action, did not reside in Douglas County, Nebraska; that the pretended cause of action set forth in his petition did not arise in said county and state; and that this action is wrongfully brought therein." (For exhibits see Rec., pp. 6 to 11).

On March 13, 1920, the Court overruled this motion (Rec., p. 11). On March 17, 1920, the Director General filed his answer, in which he set up the general orders above mentioned and the want of jurisdiction by reason thereof, along with his other defenses (Rec., p. 11). On April 2, 1920, the plaintiff filed an amended petition and on April 12, 1920, the defendant filed his answer to the amended petition, in which he again challenged the jurisdiction of the Court on the grounds hereinbefore stated.

The case was tried twice. The first trial resulted in a directed verdict for the defendant. The plaintiff appealed to the Supreme Court of Nebraska and it reversed the case and ordered a new trial (Rec., pp. 21, 208 and 209). On the first appeal, the Nebraska Supreme Court dodged the jurisdictional question and refused to consider it, assigning as its reason therefor the failure of the Director General to file a cross-appeal from the judgment which, as above stated, was in his favor (Rec., p. 209). There was no final order entered against him on the first trial and he had nothing to appeal from, either directly or by cross-appeal. (The Nebraska statute only authorizes appeals from a final order, and it is not contended that an appeal should have been prosecuted from the order overruling the special appearance and motion to quash the summons, because this was not a final order).

The case was called for trial the second time May 31, 1922. The defendant objected to the empaneling of a jury and to the trial of the case on the jurisdictional ground hereinbefore stated, but the Court overruled the objection (Rec., pp. 38 and 39). He again challenged the jurisdiction of the court on the grounds above stated, at the close of the plaintiff's evidence and also at the close of all the evidence (Rec., pp. 85 and 190).

The second trial resulted in a verdict against the defendant for $46,840.11. Judgment was entered thereon for that amount and the defendant appealed (Rec., p. 32).

On the second appeal, the Nebraska Supreme Court held that the District Court of Douglas County had jurisdiction because the Director General filed the above special appearance and motion to quash the summons. The Court states in its opinion, referring to the filing of the above motion, that "It must be conceded that unless the defendant has brought himself under the jurisdiction of the Court by a general appearance, the Court did not acquire jurisdiction" (Rec., p. 201). It is further stated in the opinion that by *filing the above motion and special appearance,* the "defendant called for a determination as to whether the Court had jurisdiction of the subject-matter of the action which required an examination of the petition and a ruling as to the nature of the action. He thereby called for the exercise of a judicial function not relating to jurisdiction over his person. He must necessarily be before the Court in order that this might be done" (Rec., p. 201).

The defendant contends that the Court erred in holding that the District Court of Douglas County, Nebraska, had jurisdiction.

At the opening of the second trial, the plaintiff, for the first time, moved to substitute James C. Davis, Agent, as defendant in lieu of Walker D. Hines, Director General of Railroads, the original defendant. The defendant objected to such substitution on the ground that the Court was without jurisdiction, and on the further ground that the substitution was not made within the time prescribed by Section 1594, Vol. 3, U. S. Compiled Statutes, 1916, 30 Stat. L. 822, which limits the time within which such substitutions can be made to twelve months. The Court overruled the objection and the substitution was made (Rec., pp. 22 and 39, paragraphs 8 and 9).

Although this question was presented by the record, the Supreme Court of Nebraska ignored it. However, by

affirming the judgment, it in effect decided that the substitution was properly made.

The defendant contends that this was error.

At the close of the plaintiff's evidence, the defendant objected to being required to produce evidence for the reason that the evidence produced by the plaintiff was not sufficient to sustain a verdict or judgment in the plaintiff's favor under the issues joined. The Court overruled the objection (Rec., p. 85). Defendant renewed this objection at the close of all of the evidence (Rec., p. 190). He also requested the Court to instruct the jury to return a verdict for the defendant, which was refused (Rec., p. 31).

The plaintiff alleged in his petition that the following acts and omissions constituted negligence and relied upon them for recovery:

(a) That the defendant neglected to provide wires, repairs, tools and machinery for the proper operation of the gantry.

(b) That the defendant failed to furnish wire upon said machinery or its appurtenances.

(c) "That the foreman directed his subordinates to procure wire to complete said work."

(d) That the foreman accepted the wire and "directed its use by his subordinates without carefully examining the same and neglecting to see and note its dangerous condition."

(e) That the wire with the explosive cap attached thereto "was negligently given to him (plaintiff) as a part of the tools and materials with which he was supplied for his said work" (Rec., p. 13).

All of these allegations were submitted to the jury (Instruction 4, Rec., p. 25, post p. 7).

The defendant contends that the plaintiff's injury was not such as should reasonably have been foreseen as the

natural and probable consequence of any of the above acts or omissions relied upon by the plaintiff as negligence, in the light of attending circumstances. He also contends that the plaintiff's injury did not arise out of or in the course or scope of his employment; and contends that the plaintiff was not engaged in the prosecution of the defendant's business, or in any way acting within the scope or course of his employment, either when he received the cap or when he exploded it and injured his eyes. The defendant further contends that he did not furnish the plaintiff the cap for his use in connection with the prosecution of the defendant's business, but that the plaintiff requested E. W. O'Hara, one of his fellow-servants, to give him the cap and that he gave it to him in compliance with such request for the purpose of satisfying the curiosity and personal ends of the plaintiff; and that when the plaintiff received and accepted the cap from his fellow-workman, he assumed the risk of exploding it and injuring his eyes. He also contends that the evidence fails to show that the plaintiff was engaged in interstate commerce when injured, within the meaning of the Federal Employers' Liability Act, upon which he relies for recovery.

The defendant further contends, for the foregoing reasons, that the Court should have held, as a matter of law, that the plaintiff was not entitled to recover and should have reversed the case with instructions to enter judgment for the defendant.

SPECIFICATION OF ERRORS

I.

The Supreme Court of Nebraska erred in holding that the District Court of Douglas County had jurisdiction of this action.

II.

The Supreme Court of Nebraska erred in affirming the ruling of the District Court of Douglas County permitting

the plaintiff to substitute James C. Davis, Agent, as defendant, in lieu of Walker D. Hines, Director General of Railroads, the original defendant.

III.

The Supreme Court of Nebraska erred in holding that the evidence was sufficient to sustain the verdict.

IV.

The Supreme Court of Nebraska erred in holding that there was sufficient evidence to warrant the trial court in submitting either or all of the plaintiff's allegations of negligence to the jury.

V.

The Supreme Court of Nebraska erred in holding that the plaintiff did not assume the risk.

VI.

The Supreme Court of Nebraska erred in holding that the plaintiff was employed in interstate commerce when injured.

VII.

The defendant requested the Court to give the following instruction to the jury:

> "1. You are instructed to return a verdict for the defendant" (Rec., p. 31).

The Court refused the instruction and the Supreme Court of Nebraska erred in affirming this ruling.

VIII.

The District Court instructed the jury (Instruction 4, p. 25) as follows:

> "The burden of proof is upon the plaintiff to establish by a preponderance of the evidence the following material allegations:

"1. That the defendant was negligent in some particular, as alleged in the plaintiff's petition.

"2. That the said negligence, if any you find, was the direct, immediate and proximate cause of the injury to the plaintiff.

"3. The amount of damage which the plaintiff has sustained, if any.

"If you find that the plaintiff has failed to establish any one or all of the above propositions by a preponderance of the evidence your verdict will be for the defendant; but if you find that plaintiff has so established these propositions your verdict will be for plaintiff."

The Supreme Court, by affirming the judgment, approved this instruction and erred in so doing.

The foregoing specifications of error were set forth and relied upon by the petitioner in his petition for the writ of certiorari herein.

ARGUMENT

I.

The Court erred in holding that the District Court of Douglas County, Nebraska, had jurisdiction of this action.

This action was not brought in the venue prescribed by valid orders of the Director General. This fact did not appear on the face of the plaintiff's petition, but it is disclosed by the undisputed evidence (Rec., p. 46).

General Orders of the Director General Nos. 50 and 50-A provide that actions at law, based on claims for injury and growing out of Federal control,

"shall be brought against the Director General of Railroads, and not otherwise * * *

"Subject to the provisions of General Orders Nos. 18, 18-A and 26, heretofore issued by the Director

General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company."

General Order No. 18, as amended by General Orders Nos. 18-A and 18-B, provides:

"that all suits against the Director General of Railroads, as authorized by General Order No. 50-A, must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose * * *"

In *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554, the court decided that General Order No. 50 is valid. On page 561 the court says:

"All doubt as to how suits should be brought was cleared away by General Order No. 50, which required that it be against the Director General by name."

In *Alabama, Etc. Ry. Co. v. Journey*, 257 U. S. 111, the court holds that General Order No. 18 is valid. In that case the Supreme Court of Mississippi held that General Order No. 18 exceeded the powers conferred on the President and by him on the Director General. Whether the court erred in so holding was the question presented. The court says:

"That it did err is clear from what we said in *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554, decided since entry of the judgment under review. Section 10 of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, 456, permitted enforcement of liabilities against carriers while under federal control except 'insofar as may be inconsistent * * * with

any order of the President.' It was within the powers of the Director General to prescribe the venue of suits; and the facts set forth in the order show both the occasion for it and that the venue prescribed was reasonable."

In *Davis v. Farmers Co-op. Equity Co.*, 43 Sup. Ct. Rep. 556 (decided May 21, 1923), the court says with respect to bringing suits in jurisdictions other than where the plaintiff resided or the cause of action arose:

> "During federal control, absences of employes incident to such litigation were found, by the Director General, to interfere so much with the physical operation of the railroads, that he issued General Order No. 18 (and 18-A) which required suit to be brought in the county or district where the cause of action arose, or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama & Vicksburg Ry. Co. v. Journey*, 257 U. S. 111. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as war."

The Supreme Court of Nebraska refused to give any effect to these orders of the Director General, because the defendant filed the motion to quash the summons hereinbefore referred to, as appears from its opinion in this case. Paragraph 2 of the syllabus reads:

> "An action for damages against the Director General of Railroads under the Federal Employers' Liability Act is both local and transitory under General Order No. 18-A, and the district courts of this state have jurisdiction over the subject-matter of such an action. Where the Director General specially appears to object to the jurisdiction of the court over his person, and at the same time challenges the jurisdiction of the court over the subject-matter of the controversy, as to which the motion is not well founded, this is a voluntary appearance equivalent to the service of summons, and gives the court jurisdiction over the person of such officer" (Rec., p. 196).

General Order No. 18 was made April 9, 1918, while General Order No. 50 was not made until October 28, 1918. When General Order No. 18 was made suits under Section 10 of the Federal Control Act (40 Stat. 451, chap. 25) were brought against the carrier and not against the Director General. Service was made by serving an agent of the carrier, out of the operation of which the cause of action arose in the same way as service was made on like agents of such railroads prior to federal control, and could be made at points far remote from the place where the plaintiffs resided or where the causes of action arose, and if the construction placed upon General Order No. 18 by the Supreme Court of Nebraska is correct, then suits could have been brought against any carrier under federal control at any place where it could be served with process, and General Order No. 18 did not accomplish its declared purpose, viz., prevent the bringing of suits "in jurisdictions far remote from the place where the plaintiffs resided or where the causes of action arose". If the construction placed on General Order No. 18 by the court is correct, its meaning was the same as if it had read, "It is therefore ordered, that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose"; *provided that suits may be brought in any county or district where service of process can be made,* instead of the way it in fact read.

Such a provision would have made the order impotent, as it would have permitted suits to be brought and maintained in all respects the same as they could be brought before the order was issued. If the construction given the order by the state court is correct, the order does not say what it means nor mean what it says.

In the opinion the court says:

"After the petition was filed and summons served in Douglas County, the Director General, 'appearing spe-

cially and for the purpose only of objecting to the jurisdiction of the court over the person of the defendant and over the subject- matter of this action, moves the court to quash the summons herein.' As grounds therefor he alleged that plaintiff did not reside in Douglas County, Nebraska, at the time of the accrual of the cause of action, and that such cause of action did not arise in said county and state. No evidence was presented to prove these allegations, and the motion was properly overruled" (Rec., p. 198).

* * * * * * * *

"If the defendant had only appeared specially to object to the court's jurisdiction over his person on account of the action not being brought in the proper county, and that he was not compelled to litigate the question in Douglas County, the court would not have acquired jurisdiction over his person; but, if the defendant appears for any purpose except to object to the court's jurisdiction over his person, he thereby enters a general appearance in the action.

"Defendant called for a determination as to whether the court had jurisdiction of the subject- matter of the action, which required an examination of the petition and a ruling as to the nature of the action. He thereby called for the exercise of a judicial function not relating to jurisdiction over his person. He must necessarily be before the court in order that this might be done" (Rec., p. 201).

* * * * * * * *

(It is apparent that these statements are inconsistent, for if the motion was overruled because "no evidence was presented to prove" the allegations thereof, the Court was not called upon to determine anything except this fact. An examination of the motion will disclose that it does not call for a determination of the nature of the action. (See post., p. 17.)

The court further says:

"It must be conceded that, unless the defendant has brought himself under the jurisdiction of the court by a

general appearance, the court did not acquire jurisdiction" (Rec., p. 201).

As above stated, it did not appear from the face of the petition that the suit was not brought in the venue prescribed by General Order No. 18-A, because it was not alleged therein either where the plaintiff resided or where his pretended cause of action arose. Before the defendant filed the motion to quash, he had been served with summons and there were no defects in the service so far as appeared from the face of the record, and if, as the court holds, the motion was equivalent to the service of summons, the defendant, by filing it, added nothing to what had already been done, and there was no way for him to invoke the benefit of the order without waiving it. The defendant had the right, under the Nebraska practice, to raise the question of venue in his answer and include it with a defense on the merits. In other words, the defendant might have filed his answer in the first instance, setting up therein the want of jurisdiction along with his other defenses, but he was not bound to do so as he also had the right, under the settled practice of the state, to do as he did do, viz., first file the motion to quash and when that was overruled, file his answer in the form above stated. This practice is settled by Sections 8610 and 8612 of the Revised Statutes of Nebraska for 1922 and by the decisions of the Supreme Court of that state. The decisions referred to are cited on page 20 of this brief and the above sections of the Code are set out at page 21.

The court states in its opinion that no evidence was presented to prove the allegations of the motion to quash and that it "was properly overruled". The record does not disclose upon what ground the motion was overruled, but assuming that it was overruled on the ground stated by the court, it should be remembered that courts take judicial notice of the orders of the Director General *(Davidson v. Payne*, 289 Fed. 69) and that the allegations with respect to the place of the plaintiff's residence and injury were ad-

mitted at the trial (Rec., p. 46), and the failure of the defendant to prove these facts, so peculiarly within the plaintiff's own knowledge, in support of the motion, did not give the court jurisdiction because, as above stated, the defendant, under the state practice, was not required to file the motion to quash but might have raised the objection to jurisdiction in the first instance in his answer. If the motion was overruled on the ground stated by the court, it was a nullity and the rights of the parties remained the same as if it had never been filed and it did not, under the state practice, constitute a general appearance. Authorities in support of this statement are cited herein at page 17 and following pages of this brief.

In the case of *James C. Davis, Director General of Railroads, etc., Petitioner, v. George Wechsler,* decided by this court October 22, 1923 (not yet reported), the court decides the questions under discussion. That suit was commenced in the Circuit Court of Jackson County, Missouri. The cause of action arose in another county, and the plaintiff then and when the suit was brought resided in Illinois. The defendant set up a general denial and also that the court was without jurisdiction because of General Order No. 18-A. The court says:

> "The plaintiff by replication relied upon the invalidity of the order, a point now decided against him * * *. On February 25, 1921, the plaintiff amended and John Barton Payne, Director General of Railroads and agent designated by the President under Transportation Act, 1920, was substituted by agreement as successor of Hines and according to the record the 'substituted defendant entered his appearance in said cause and adopted the answer theretofore filed by said Walker D. Hines, defendant'. It was not disputed and was stated by the court below that by Missouri practice the defendant had a right to unite a plea to the jurisdiction and a defense on the merits, but it was held by the Court of Appeals affirming a judgment for the plaintiff that the provision in General Order 18-A went only to the venue of the action and was waived by the ap-

pearance of Payne. A similar effect was attributed to the appearance of the present petitioner Davis in the place of Payne. A writ of certiorari was denied by the Supreme Court of the State.

"We are of opinion that the judgment must be reversed. Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. Even if the order went only to the venue and not to the jurisdiction of the Court, each Director General in turn plainly indicated that he meant to adopt the position of his predecessor, and to insist that the suit was brought in the wrong county. His lawful insistence cannot be evaded by attempting a distinction between his appearance and his substantially contemporaneous adoption of the plea. Indeed when the law requires him to unite his defense on the merits, which imports an appearance *pro hac vice*, with his preliminary plea, it is hard to understand how any effect could be attributed to the statement that he appeared. The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of Federal right. The principle is general and necessary. *Ward v. Love County*, 253 U. S. 17, 22. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill v. Grand Lodge Knights of Pythias*, 225 U. S. 246. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way. See *American Ry. Express Co. v. Levee*, decided this day.

"The Transportation Act, 1920, Feb. 28, 1920, c. 91, Sec. 206 (a) and (d); 41 Stat. 456, 461, 462, in no way invalidates a defense good when it was passed."

In *Traux v. Corrigan*, 257 U. S. 312, the court holds:

"Where the issue is whether a state statute, in its application to facts specifically alleged, and admitted

by demurrer, violates the plaintiff's rights under the Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect; it is not bound by the state court's conclusion in this regard, nor by that court's declaration that the statute is merely a rule of evidence."

In *Ward v. Love County*, 253 U. S. 17, the court holds:

"The jurisdiction of this court to review a judgment of a state court the effect of which is to deny a federal right, cannot be avoided by placing such judgment on non-federal grounds which are plainly untenable."

The question as to whether or not the District Court of Douglas County had jurisdiction does not depend upon whether or not the special appearance and motion to quash constituted a general appearance under the rules of local practice; but depends upon the validity of the Orders. The District Court of Douglas County was without jurisdiction, even though the defendant did enter a general appearance, which we deny, by filing the motion to quash the summons. Neither does this question hinge upon nice distinctions as to whether or not the cause of action is transitory, but it seems to us plain that the very purpose of the order was to make such causes of action local. The orders superseded all other laws both federal and state; they were specific in their terms, and while in effect were the supreme law of the land upon the subjects which they covered. They were of general application and did not vest any discretion in the attorneys for the Director General, or in any of his other administrative officers, or in the courts, and no attorney or officer was vested with the power to waive the orders or any of the provisions thereof. If the attorneys had power to waive one provision of an order, they had the power to waive all, and thereby had the power to set aside or nullify every order issued by the Director General. If he had intended to vest such discretion in them and to clothe them with such power, it is manifest that he would have done so by express terms.

In *Stanley v. Schwalby*, 162 U. S. 255, the court holds:

> "Neither the Secretary of War, nor the Attorney General, nor any subordinate of either, is authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers."

See also—

Smith v. Reeves, 178 U. S. 436,
Southern Bridge Co. v. U. S. Shipping Board, 266 Fed. 747, 751.

The motion to quash the summons filed in the present case did not constitute a general appearance.

In *Bankers Life Insurance Co. v. Robbins*, 59 Neb. 170, paragraph 2 of the syllabus reads:

> "Whether an appearance is general or special does not depend upon the form of the pleading, but upon its substance."

In *South Omaha National Bank v. Farmers & Merchants National Bank*, 45 Neb. 29, paragraph 1 of the syllabus reads:

> "An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction. Whether it is general or special is to be determined by an examination of the substance of the pleading, and not by its form."

This principle is adhered to in *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 267, on rehearing, 71 Neb. 273, which is cited approvingly by the court in its opinion in the present case. This was a suit brought in Jefferson county, Nebraska, on a benefit certificate issued by a mutual benefit association that had

appointed the Auditor of State its attorney-in-fact upon whom process might be served. An alias summons was served by the sheriff of Jefferson county on the attorney-in-fact. The defendant moved to quash this service, alleging in his motion "that the court was without jurisdiction of the subject-matter or of the person of the defendant for the following reasons," whereupon the reasons are set forth, ten in number. The court says (p. 273):

> "We are now urged to disregard the challenge therein made to the jurisdiction of the subject-matter and treat it as surplusage. *Our duty in this matter depends upon whether or not, under the 'reasons assigned,'* there could have been anything considered by the court except the sole question of jurisdiction over the person of the defendant; not upon what was considered, but what might have been properly considered and determined by the court * * *
>
> "With these considerations in view we turn to the 'reasons assigned'."

The court then quotes the fifth and seventh reasons assigned in the motion and says (p. 275):

> "The fifth objection challenges the right of the plaintiff to bring and maintain the action in Jefferson county. This raises the legal question whether or not the alleged cause of action set forth in the petition was local or transitory. The challenge was made to the court by apt language in the formal part of the instrument and in the reasons assigned, and is a jurisdictional question, not of the person, but of the subject-matter of the action. And when followed by an exhaustive showing on this point, as was done, of the truth of these allegations, we can come to but one conclusion, and that is, it was the intention of the pleader to challenge the jurisdiction of the court over the subject-matter, and that he has done so both by his averments and by the evidence. And again, the seventh assignment, if it means anything, is a plea of res judicata of the matters then pending before the court. It would be difficult to understand how the language of this assignment could be

used for the sole purpose of challenging the jurisdiction of the court over the person of the defendant. That, to avoid an appearance, the objections must be confined to this purpose has been the holding of this court from its organization."

In 4 C. J. 1317 it is said:

"Whether an appearance is general or special is to be determined from the relief asked, and in reaching its conclusion the court will always look to matter of substance rather than form. If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character, although it may forestall the ordinary presumption that an appearance is general. Where a special appearance is evidently intended, the court cannot enlarge it and make it general, for the extent to which the defendant submits himself to the jurisdiction when he thus voluntarily comes in is determined by his own consent."

An examination of the defendant's motion (Rec., p. 6), in the light of the foregoing authorities, shows that he did not enter a general appearance by filing it. The motion simply asked the court to quash the summons and prayed for no other relief. The "*reasons assigned*" in the motion for quashing the summons were the orders of the Director General, hereinbefore referred to.

If the motion did constitute a general appearance, which we deny, and if by entering a general appearance the Director General waived the benefit of his Orders, which we also deny, then it must follow that he could not invoke their benefit without waiving them and he had as well not made them. They were mere "scraps of paper" unless the courts gave effect to them by enforcing them when called upon to do so.

The defendant challenged the jurisdiction of the court at the first opportunity on the ground that the suit was not

brought in the venue prescribed by General Order No. 18-B, and again challenged it in his answer in accordance with the well settled practice, as appears from the following decisions of the Supreme Court of Nebraska:

Baker v. Union Stock Yards Nat. Bank, 63 Neb. 801,
Stelling v. Peddicord, 78 Neb. 779,
Hurlburt v. Palmer, 39 Neb. 158,
Kyd v. Exchange Bank, 56 Neb. 557,
Templin v. Kimsey, 74 Neb. 614.

As stated by Judge Letton in his dissenting opinion in the present case (Rec., p. 202), "The court overrules these cases without mentioning them".

In *Baker v. Union Stock Yards National Bank*, cited above, it is said:

"A succession of well-considered cases has settled the law in this state as to the proper practice where want of jurisdiction over the person of a defendant is asserted. If a defendant claims that the court has acquired no jurisdiction over his person, by reason of defects or irregularities in the process, or service thereof, his course is by special appearance and objections to the jurisdiction; and if he goes further, and enters a general appearance, or invokes the powers of the court for any other purpose than quashing the pretended process, or service thereof, the defects are waived. *Omaha Loan & Trust Co. Savings Bank v. Knight*, 50 Neb. 342; *Ley v. Pilger*, 59 Neb. 561. But where, for some reason, the defendant is privileged from suit in the county where or at the time when he is sued, he may set up want of jurisdiction by answer, along with any other defenses he may have. *Hurlburt v. Palmer*, 39 Neb. 158; *Anheuser-Busch Brewing Ass'n. v. Peterson*, 41 Neb. 897; *Herbert v. Wortendyke*, 49 Neb. 182; *Barry v. Wachosky*, 57 Neb. 534, 535; *Goldstein v. Fred Krug Brewing Co.*, 62 Neb. 728. While in several of these cases the defendant first made a special appearance and objections to the court's jurisdiction over him, and, after these were overruled, set up the defense in his answer, we do not think such course is required in

cases of this character. No special appearance or preliminary objections were made in *Hurlburt v. Palmer, supra,* or *Herbert v. Wortendyke, supra,* and the provisions of sections 94 and 96 of the Code of Civil Procedure, taken together, would seem to make it clear that they were not required. See also *Kyd v. Exchange Bank of Cortland,* 56 Neb. 557. If such a defense is waived if not set up in the answer, it follows that the defense is not waived when set up by answer, and therefore that it is not waived by any preliminary steps required before raising it in the prescribed way. That such is the proper construction of the Code, is apparent upon consideration of the practice prior to the Code, and a comparison with the holdings of other courts."

(The sections of the Code referred to above, being Sections 8610 and 8612, Compiled Statutes of 1922, read:

"Sec. 8610. The defendant may demur to the petition only when it appears on its face, either:

"First. That the court has no jurisdiction of the person of the defendant or the subject of the action;

"Second. That the plaintiff has not legal capacity to sue;

"Third. That there is another action pending between the same parties for the same cause;

"Fourth. That there is a defect of parties, plaintiff or defendant;

"Fifth. That several causes of action are improperly joined;

"Sixth. That the petition does not state facts sufficient to constitute a cause of action."

Section 8612 reads:

"When any of the defects enumerated in Section 107 (Section 8610) do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action.")

In its opinion the Supreme Court of Nebraska mentions the fact that at the first trial a motion was made to dismiss the case for the reason that the plaintiff had not proved facts sufficient to constitute a cause of action, and says:

> "But no objection was made during the trial to the jurisdiction of the court, and the original special appearance and motion to quash the summons had been properly overruled, since there was no evidence to support it. No motion for a rehearing was made in this court after the filing of the former opinion in the case, and the former decision of the court has become the law of the case."

We fail to see how this tends to show that the District Court of Douglas County had jurisdiction of this case. With respect to the motion to dismiss referred to by the court, it should be remembered that the District Court sustained it and entered judgment for the defendant, and there was no reason for him to complain further that the court had no jurisdiction. The statement that no objection was made during the trial to the jurisdiction of the court is misleading and overlooks the fact that want of jurisdiction was alleged in the answer and proved by undisputed evidence. In *Anheuser-Busch Brewing Association v. Peterson,* 41 Neb. 897, it expressly appears from the opinion that after judgment against him on the merits, defendant Busch *filed a motion for a new trial,* but his objection to jurisdiction was, nevertheless, sustained by the Supreme Court upon appeal. Clearly, if the defendant has the right to assert a defense upon the merits together with objections to jurisdiction not appearing upon the record, he must have the right to avail himself of that defense. To ask and *obtain* the judgment of a trial court that the plaintiff had failed to establish a right to recover upon the merits could confer no jurisdiction upon that court when the undisputed evidence conclusively showed a lack of such jurisdiction, if no such effect is given to the filing in the trial court of a

motion asking for a new trial of the entire case. We do not understand what bearing the fact that no motion for a rehearing was filed has, unless the court wishes to give the inference that the jurisdictional question was not directed to its attention on the first appeal. In order that there may be no mistake concerning this, we direct attention to the following from the opinion of the court on the first appeal (Rec., p. 213):

> "Defendant filed a special appearance objecting to the jurisdiction of the court over the person of defendant and over the subject-matter of the action, and moved the court to quash the summons theretofore issued, on the ground that certain general orders of the Director General of Railroads set out as a part of the motion provided that suits against the Director General of Railroads, as authorized by General Order No. 50-A, should be brought in the county or district where the plaintiff resided at the time the cause of action arose. This objection was overruled. It was again urged in the answer, and, by brief filed out of time by leave of court, it is sought to be urged now. But no cross-appeal from the ruling of the trial court was prosecuted by defendant, as required by the rules of this court, and appellee cannot be heard to urge this point now."

The rule of the court has no application whatever to a case of this nature, but only applies to cases where a final order is entered against the appellee and he desires to have that ruling reviewed.[1] In the present case there was no final order entered *against the appellee on the first trial, but the judgment was in his favor and he had nothing to appeal from, either directly or by cross-appeal.*

The inference made by the above quotation from the opinion on the second appeal that the jurisdictional question

1.—The rule referred to reads: **On cross-appeal.**—Co-parties of appellants may join in the appeal or take cross-appeal, or any appellee may take cross-appeal, by filing with the clerk of this court, within four months after the date of the judgment appealed from or the overruling of the motion for a new trial, a praecipe which shall designate the name of such party as cross-appellant, and the names of all adverse parties as cross-appellees.

was settled by the first appeal is not substantiated by the record.

It is settled law that the case could not be brought to this court from the decision in the first appeal, reversing the case and remanding it for a new trial.

> "This court cannot be called upon to review the action of the state court by piecemeal, and even if the judgment does finally dispose of some elements of the controversy, unless it is final on its face as to the entire controversy this court will not review it."
>
> *Louisiana Navigation Co. v. Oyster Commission*, 226 U. S. 99,
> *Chesapeake & O. Ry. Co. v. McCabe*, 213 U. S. 207,
> *Bruce v. Tobin*, 245 U. S. 18.

Apparently the Supreme Court of Nebraska merely *suspended* the rules of practice, settled by its former decisions, and did not overrule them. Whatever may be said as to the character of the defendant's motion, the opinion seems to be "special" and for the purpose of this case only, and not general". Neither *Baker v. Union Stock Yards National Bank*, 63 Neb. 801, nor any of the many kindred cases, are even mentioned.

Nor is this all. The court below in determining whether an objection to jurisdiction over the subject matter of the action was presented by the defendant's special appearance, ignored the *substance* of the objection; whereas, in *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 267, 273, it plainly held that the court's duty in determining this question was to look to the "reasons assigned" rather than to the formal parts of the motion (Supra, p. 18).

In the opinion in the case at bar, the Supreme Court of Nebraska said (Rec., p. 198):

"After the petition was filed and summons served in Douglas County, the Director General, 'appearing specially and for the purpose only of objecting to the jurisdiction of the court over the person of the defendant and over the subject matter of this action, moves the court to quash the summons herein'. As grounds therefor, he alleged that *plaintiff did not reside in Douglas County, Nebraska, at the time of the accrual of the cause of action, and that such cause of action did not arise in said county and state.*" * * * "The orders of the Director General are concerned with, and govern only the venue of the action" (Rec., p. 199). * * * "The right to defend in the particular district is not a matter of jurisdiction, but of venue only, and the privilege may be waived" (Rec., p. 200). * * * *"The order of the Director General fixing the venue did not affect the subject matter of the action"* (Rec., p. 201).

In *Perrine v. Knights Templar's, supra,* as appears from the opinion (page 273), the defendant's objection stated:

"Comes now specially above named defendant for the sole purpose of objecting to the jurisdiction of the court, and for no other purpose, and submits that the court is without jurisdiction of the *subject matter* or of the person of the defendant for the following reasons:

"* * * 5. That the defendant is a foreign co-operative and mutual insurance company, doing business in the State of Nebraska only by virtue of a license issued to it by said state as such corporation, and *neither the alleged cause of action nor any part thereof arose in Jefferson County or in the state of Nebraska, and plaintiff is not now, and never has been, a resident or citizen of the state of Nebraska.*"

In the opinion, page 275, it is said:

"The fifth objection challenges the right of the plaintiff to bring and maintain the action in Jefferson County. This raises the legal question whether or not the alleged cause of action set forth in the petition was

local or transitory. The challenge was made to the court by apt language in the formal part of the instrument and in the reasons assigned, and *is a jurisdictional question, not of the person, but of the subject matter of the action.*"

It thus appears that the almost identical language which in the *Perrine* case the Supreme Court of Nebraska held appropriately questioned the court's jurisdiction *over the subject matter of the action,* was held in the case at bar, to raise only a question of venue, which "*did not affect the subject matter*".

Again, in the face of the fact that the *only* "reason assigned" in the motion filed by the defendant in the instant case was that the plaintiff's cause of action did not arise in Douglas County, Nebraska, and that the plaintiff did not reside in said county, the Supreme Court of Nebraska held that this objection, concededly valid and sufficient, was waived because in the formal part of the motion the words "subject matter" appear.

There is thus presented by the record herein a complete reversal in every particular of the decision in *Perrine v. Knights Templar's, supra,* which, instead of being overruled, is cited in the opinion in support of the conclusions here complained of.

The Supreme Court of Nebraska thus evaded the plain assertion of a federal right by innovations in local practice *applicable alone to the case at bar and flatly at variance with its own previously well-settled rules.*

The fact is the court arbitrarily refused to give effect to the war order in question and its decision amounts to holding the order void.

II.

The Court erred in affirming the ruling of the District Court of Douglas County permitting the plaintif to substitute James C. Davis, Agent, as defendant, in lieu of Walker D. Hines, Director General of Railroads, the original defendant.

When the case was commenced, January 9, 1920, Walker D. Hines was Director General of Railroads. March 11, 1920, he was designated as Agent in accordance with subdivision (a) of Section 206 of the Transportation Act. May 14, 1920, Walker D. Hines, as such Agent was succeeded by John Barton Payne, who in turn was succeeded March 6, 1921, by James C. Davis. No application for substitution was made until the case was called for trial the second time, which was May 31, 1922. The defendant objected to substitution on the ground that the court had no jurisdiction of the action, and on the further ground that Section 1594, Vol. 3, U. S. Compiled Statutes 1916, 30 Stat. L. 822 (entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899), limited the time within which such substitutions could be made to 12 months.

We have not overlooked the Winslow Act of March 3, 1923, which amends Section 206 of the Transportation Act, 1920, by providing that actions *properly commenced* and pending at the time the amendment becomes effective "shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads, or the Agent designated under subdivision (a), but may (despite the provisions of the act entitled 'An Act to prevent the abatement of certain actions,' approved February 8, 1899) be prosecuted to final judgment * * * substituting at any time before satisfaction of such final judgment * * * the Agent designated by the President then in office * * *".

The defendant contends that the limitation of 12 months prescribed by the act of February 8, 1899, applies to this

case because it was not *properly commenced,* as it was commenced contrary to the provisions of General Order No. 18-B. Since it was not properly commenced, and therefore was not properly pending when the Winslow Bill passed, substitution was not authorized by that act.

Payne v. Industrial Board of Illinois, 42 Sup. Ct. 462,
LeCrone v. McAdoo, 253 U. S. 217,
Payne v. Slatinka, —— U. S. —— (decided January 8, 1923).
Davidson v. Payne, 289 Fed. 69.

III.

The Court erred in holding that the evidence was sufficient to sustain the verdict.

The verdict is not supported by the evidence because it fails to show, either that the plaintiff's injury was due to actionable negligence, or that he was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, when injured.

The plaintiff claims that the Director General was engaged in interstate commerce; that he was employed by him in such commerce when injured; that his injuries resulted from the negligence of the employes of the Director General, and that, therefore, he is entitled to recover damages under the Federal Employers' Act, as appears from his amended petition, in which it is alleged in substance:

That the plaintiff was employed by the Director General in the operation of a gantry, which was maintained and used by the Director General for transferring interstate shipments from one car to another; that on September 13, 1919, the plaintiff and other employes were making a sling out of a wire cable, to be used in transferring a car of poles, and that they were engaged in wrapping the cable with cloth to protect the employes from injury by the jagged

ends of the cable; that they needed wire with which to tie the cloth to the cable, but that the Director General had neglected to provide it, and that "the foreman directed his subordinates to procure wire to complete said work"; that thereupon one of the employes sought and found a piece of wire in an empty coal car and "brought it to said foreman, who accepted same and directed its use by his subordinates without carefully examining the same and neglecting to see and note its dangerous condition"; that the employes

> "undertook to use said wire for said purposes, which wire had been retained, and while the foreman and one of the defendant's employes aforesaid were using part of said wire binding said cloth upon said cable ends this plaintiff undertook to straighten and prepare the small remaining portion of said short wire so that the wire could be used for the said purpose alleged.
>
> "Plaintiff alleges that there was a small, metal bulb or cylinder on the end of said wire, and while engaged in preparing said wire the said bulb exploded.
>
> "Plaintiff alleges that he afterwards learned that this bulb was some sort of percussion cap with tremendous explosive power, but did not know of it at the time he was at work and the same was negligently given to him as a part of the tools and materials with which he was supplied for his said work.
>
> "Plaintiff alleges that as a result of said explosion he was permanently blinded in both eyes and has been informed by his physician that both his eyes will have to be removed" (Rec., p. 2).

In his answer to the amended petition the Director General, in addition to the jurisdictional defense hereinbefore referred to, admitted the formal allegations of the amended petition; admitted that E. W. O'Hara found a piece of wire in an empty coal car; that the foreman did not examine it and did not see that there was a cap attached thereto; denied generally the other allegations of the plaintiff's petition, and alleged that:

"E. W. O'Hara cut the cap off of the wire" and "that after so doing the said E. W. O'Hara was in the act of throwing said cap away, when the said John O'Hara requested the said E. W. O'Hara to give him the said cap, and defendant alleges that thereupon the said E. W. O'Hara gave the said cap that had been cut off of said wire to the said John O'Hara, and that a short time thereafter he exploded the same and injured his eyes, but defendant expressly denies that the said injuries arose out of or in the course or scope of the employment of the said John O'Hara, and denies that he was engaged in the prosecution of the defendant's business, or in any way acting within the scope or course of his employment, either when he received said cap or when he exploded it and injured his eyes.

"Defendant further alleges that the said E. W. O'Hara was not acting within the scope or course of his employment when he gave the said cap to the said John O'Hara, and that he did not give the cap to the said John O'Hara for his use in connection with the prosecution of the defendant's business in any way, but gave it to the said John O'Hara upon his request, as aforesaid, for the purpose of satisfying the curiosity and personal ends of the said John O'Hara.

"Defendant further alleges that neither he nor any of his agents, servants or employes had any knowledge of the existence of the said cap until its discovery in the empty coal car by the said E. W. O'Hara, and that neither this defendant nor any of his agents, servants or employes have any knowledge as to where the said cap came from or as to how or when the same got into said car."

He further alleged in the answer that the plaintiff's injuries were due solely to his own fault and negligence, and not to any negligence on the part of the defendant or his agents; and "that when the plaintiff received and accepted said cap from the said E. W. O'Hara, the plaintiff assumed the risk of exploding it, and injuring his eyes in the manner in which he did injure them".

The Iowa Workmen's Compensation Act was also pleaded in the answer (Rec., p. 16).

Under the issues so joined the defendant is not liable, unless the evidence is sufficient to sustain a verdict under the Federal Act (See Iowa Workmen's Compensation Law, which supersedes the common law with respect to liability for personal injuries, Rec., p. 142).

There was no proof of negligence.

Before discussing the evidence we will review the decisions of the Supreme Court of Nebraska rendered on the first and second appeals.

As stated, the first trial resulted in an instructed verdict for the defendant, and the first appeal was an appeal by plaintiff from the judgment in favor of the defendant entered on this verdict. On this appeal the court decided: "The provisions of the Federal Employers' Liability Act create a liability against the employer for the negligence of a fellow employe of an injured workman," and that it was "error for the trial court to instruct the jury to return a verdict in favor of defendant" (Rec., p. 209).

There was no controversy with respect to the defendant's liability for the negligence of a fellow servant. That he is liable for such negligence, if any, is settled by the terms of the Federal Act. The question was whether the evidence proved the charge that a fellow servant was negligent, or any of the other charges relied upon in the petition.

The court says in its opinion on the first appeal (Rec., p. 212): "In the present state of the record it does not appear necessary to determine whether defendant was guilty of actionable negligence in failing to provide suitable wires, repairs, tools and machinery for the proper operation of

the gantry * * *" and the court holds that the question as to whether or not E. W. O'Hara was guilty of actionable negligence, when he let the plaintiff have the cap, was for the jury and reversed the case on this ground.

At the second trial the court by its instructions (see Instructions 1, 2, 3 and 4, Rec., p. 23) submitted all of the alleged acts of negligence set forth in the plaintiff's petition to the jury.

On the second appeal the court decided, among other things:

> "There being no substantial difference in the evidence upon the second trial of this case from that set forth in the opinion at the former hearing, 108 Neb. 74, 187 N. W. 643, the conclusion of the court that the evidence was sufficient to sustain a judgment has become the law of the case, and is adhered to" (Rec., p. 196).

In its opinion on the second appeal, the court says (Rec., p. 197):

> "The principal grounds relied upon for reversal are: that the court had no jurisdiction over the person of the defendant, and over the subject-matter of the suit; and that the evidence is not sufficient to support the verdict.
>
> "Error is also assigned as to the giving of instructions by the court, and the refusal to instruct the jury to return a verdict for the defendant. It is also said that it was prejudicial error for the court to embody in its instructions allegations of negligence unsupported by any competent testimony. In this connection it is said that it was not negligence for the defendant to fail to provide wire with which to tie the cloth to the cable, nor for the foreman to direct the use of the wire without examining the same, nor negligence for him to fail to see and note the dangerous condition of the wire. It is pointed out in the former opinion that, under the

Federal Employers' Liability Act, a fellow workman stands in the shoes of the master, and when he acts for the master in a negligent manner, within the scope of his employment, his negligence is the negligence of the master. The argument in this connection that O'Hara did not give the wire to the plaintiff to promote the defendant's business, or in the course of it, but simply to comply with John O'Hara's request, was submitted to the jury, and their verdict settled the question as to whether such conduct of O'Hara was negligent * * *."

The court makes no further mention or comment in its opinion with respect to the defendant's contentions.

STATEMENT OF THE EVIDENCE

On the day of the accident the plaintiff and the men with whom he was working were employed at a gantry, which is a large crane used to transfer heavy shipments from one car to another. The record shows that some of the shipments transferred were moving in interstate commerce, but does not show that the gantry was used exclusively to transfer shipments moving in such commerce.

They finished transferring a carload of steel during the forenoon and had nothing to do until another car was set at the gantry by the switch crew. While they were waiting for this, the foreman decided to make a sling out of a discarded wire cable.

The plaintiff testified (R., p. 41, Q. 33): "The foreman said to get the cable out of the shanty that we had put in there, and to cut off a piece that would be large enough to make a cable sling." This was a general order to the gang. After the cable was cut off, the ends were clamped together with U-bolts (R., p. 42, Q. 50). After this was done "Mr. Turner said that where the coupling (cable) was cut off, the strands of the wire were all loose, and he said it would be better to put a cloth or something around the ends, so that nobody would get their hands hurt when they were

handling the sling, and he said to get cloth to wrap around this, and we would have to have some wire to fasten it down with" (R., p. 42, Q. 59). There was no suitable wire in the tool house and this fact was reported to Foreman Turner and "He said to see if we could find some." This order was given "to the gang" (R., p. 42, Qs. 60 to 65). "My uncle (E. W. O'Hara) found some wire in the empty coal car. I did not know where he got it from at the time." He brought the wire up to "where they were working and showed it to the foreman, and held it up in his hand and asked him if that would do, and he said yes, that probably they would have to be careful or there would not be enough of it to do the work with" (Rec., p. 43, Q. 68). (Exhibit 3, Rec., p. 65, is the same kind of cap and wire). "My uncle cut off a piece to use to wrap around the cloth, and the other was handed to me. The piece that had the cylinder on it, and the wire that had been crumpled up when he tried to take it off, four or five inches of wire, besides what was crumpled up around in the end of the cylinder. I thought that if they would not have enough of the wire that what was left there could be used, and I took the piece that my uncle gave me and tried to straighten it out, the part that he crumpled up, and when I did that I sat down on the rail which the gantry runs on, and I had the cylinder part in my left hand and the end of the wire in my right hand, and as I went to pull this out and straighten it the cylinder slipped out of my left hand and struck on the rail. My hands were close to the rail when I was pulling." It exploded and blew my eyes out (R., p. 43, Qs. 71 to 76). I did not know what the cap on the end of the wire was. I was going to use the wire to help fasten the cloth on so it would stay on better (R., p. 44, Qs. 82 to 85). The first time I saw the cylinder or cap was when my uncle gave me the wire and I started to straighten it. My uncle did not say anything to me and I did not say anything to him when I took the cap. No one said anything to me at that time. Mr. Turner was a few feet away working on the clamps. I did not call his atten-

tion to the cap and " I do not suppose he knew I had it" (R., p. 47, Q. 145). No explosives or caps were used in the work and none were kept on the premises.

Francis W. O'Hara, plaintiff's witness, testified that the foreman "told some one to get some wire and cloth" and they got some cloth, but there was no wire (R., p. 56, Q. 281). When Foreman Turner asked some one to get the wire "my father (E. W. O'Hara) told us that he had found some if there wasn't any there. My father said he had seen some that morning in that car with the sheet iron that they unloaded, and he went up and got that" (R., p. 56, Q. 287). "He held it up to the foreman and asked him if it was all right" and the foreman "said it was all right, but there would not be enough of it. My daddy said it will have to be because that is all there is" (R., p. 57, Qs. 297 to 299).

Edward W. O'Hara, plaintiff's witness, testified that during the forenoon he noticed a piece of wire in the coal car from which he transferred the sheet iron. "I did not pay any attention to it" (R., p. 62, Q. 395). There was a car of telegraph poles that we expected to transfer and "the foreman said that they were to fix it right after dinner * * * He said that we would have to make a sling out of a piece of cable, as the rope was not heavy enough to handle them" (R., p. 63, Q. 403). There was a piece of cable in the shanty. "Some of them got this cable out and cut off about what we wanted of it * * *. I was at something else. I did not help take it out or cut it off * * *. It was clamped together with U-bolts. I suggested that we get a cloth and tie it around the end of the cables on account of where they were cut they were so rough that they would tear our hands" (R., p. 63, Qs. 406 to 412). The foreman said "we would have to cover it up or we would cut our hands on it and we should tie a cloth on it." This direction was not given to any one in particular. "Well, they got the cloth and had to have something to

tie it on with. I said we would have to tie it on with some wire; string would not be heavy enough. We did not have any. So I happened to think of the piece I had seen in this car that I had transferred the sheet iron from. I went in there and got it, and when I got it it had this cylinder on it. I did not know there was a cylinder on it until after I took it up. There was two strands of wire, separate strands of wire coming out of the ends of the cylinder. I tried to twist it off. It did not go and I picked up a hammer that was laying there, and I laid it across the rail and I cut it off. I took one piece with the cylinder and hung it up in the shanty, in the tool house, and the other piece I took down and I and Mr. Berg wrapped it around the cable * * * " (R., p. 64, Q. 418). When I got the wire, "I crawled out of the car with it and Turner was just coming down out of the crane * * * and I was just a little ahead of him, and I held it up, I says, I guess this will be all right; he said, yes, if you have enough of it. I did not have very much of it. I says, it will have to be enough, that is all there is" (R., p. 64, Q. 420) * * * I would not say that Mr. Turner saw the cap. "It would have been very easy to overlook. It was not very large" (R., p. 75, Q. 595). Exhibit 3 is similar to the cap and wire that I had. After Mr. Berg and I had tied one cloth on, I went and got the other piece and cut it off the cap, leaving about four or five inches attached to the cap. "I started down where Turner was working, where the cable was, and I had the wire in one hand and the cap by the end * * * John was there and I gave it to him. He reached over and took it (R., pp. 65 and 66, Qs. 433 to 459). I did not know what the cap was and did not make any effort to find out. I said it looked like a fire cracker, but I do not know whether John heard that or not (R., p. 66, Q. 456). After John took the cap, I went right on down to the end of the crane where Turner was working. I worked there a minute or a minute and a half and heard the explosion and heard John scream. I was not over five feet away" (R., p. 68, Q. 478).

On cross examination E. W. O'Hara testified: Immediately before the explosion "I was standing down there waiting for them to get the bolts tight and had the wire in my hand. John had the cap at that time" (R., p. 72, Q. 547). After I got the wire out of the coal car "I had the cap in the left hand and I tried to pull the wire out. I jerked on it two or three times and it did not come, and I tried to twist it off. It was not heavy. I thought it would twist, but it did not twist. It was too tough. I laid it across the rail like that and hit it with the hammer and cut it off, and I took one part of it, the part that had the cylinder on and I hung it up in our shanty because I was going to use it later, and took the piece that was in my hand and wrapped it around the cable." That tied on one cloth (R., p. 71, Qs. 539 and 540). I later got this strand and cut the cap off to tie the other cloth on (R., p. 72, Q. 551). He testified:

557 Q. What were you going to do with the cap when you cut it off, did you have any use for that?
A. No. I hadn't any use for it (R., p. 73).

564 Q. What were you in the act of doing with the cap after you cut it off and before John took it?
A. I had it in my hand.

565 Q. For what purpose did you have it in your hand?
A. Why, I just had that cut off, of course, is the reason I had it in my hand.

567 Q. What did you do with it?
A. I gave it to John.

568 Q. How did you happen to take it back to John?
A. I don't know. He reached over and took it, I guess. At least I gave it to him.

569 Q. Did you give it to him or did he reach over and take it?
A. Well, kind of both, I guess. When he reached I handed it to him.

570 Q. Did he say anything to you?
A. He wanted to know what it was. He said, what is

that? I says, I don't know, it looks like a fire cracker.

571 Q. Is that all that was said?
A. That is all.

At that time John walked over and sat down on the rail and I went on with my work (R., p. 74, Q. 576). It was possibly two minutes after that that I heard the explosion. I did not know what the cap was at the time I gave it to him. I had never seen one before (R., p. 74, Qs. 577 to 581).

581 Q. You had all of the wire that you needed to tie that other cloth on at that time, did you not?
A. I do not know whether I had all I needed. I had about all there was (p. 74).

584 Q. You had cut off all there was. That is all you had, was it not?
A. I cut off the most of it anyhow.

604 Q. What was your purpose in letting John take the cap from you?
A. I had no purpose. I would give it to anybody that would ask for it (p. 76).

The plaintiff, John O'Hara, and his uncle, E. W. O'Hara, both testified that the plaintiff resided in Council Bluffs, Iowa, at the time of the accident and that the accident occurred in that place (Qs. 121 to 130, p. 46).

John Turner, a witness for the defendant, testified that they used chains at the gantry to transfer sheet iron or steel. That they had chains on the day of the accident; that they had two ropes, an inch and a half rope and a two-inch rope. That this was the ordinary equipment of the gantry (R., p. 86, Qs. 729 to 740). After we finished unloading the steel we did not have any particular duties to perform, except to wait until another car was set. On the day of th accident we made a cable sling after dinner; that is all we did after we finished unloading a car of steel. We made the sling "for handling lumber and poles and anything in that

line of wood so in case we had a load of wood we would use the cable, and otherwise if it was steel or iron we used a chain." I had been working there since January, 1919, and there was no cable sling there during that time (R., p. 88, Qs. 751 to 757). "We had a piece of cable in the tool house and I told some of the boys to bring that cable out and cut about 30 or 35 feet off of it, and to make a cable we would have to have some cable clamps to make a sling, and it would be much easier to use than a chain in going around double loads of lumber and telephone poles and anything of that kind in that line, and so they brought the cable out * * * and cut it and put the clamps on and fastened the hoist on and put it around the end of the coal car. We had it fastened to the hook at the top of the crane so you could tighten the nuts on the clamps. Ed. O'Hara was standing by my left side, I believe it was. I had the monkey wrench and was tightening the clamps on the cable when I heard the explosion * * *" (R., p. 88, Q. 759). I did not know there were any explosives on the premises and had not seen this cap and did not know that any one had it. If E. W. O'Hara held the wire up for me to see, I did not see it (R., p. 89, Q. 761).

801 Q. Do you recall what directions, if any, you gave in regard to tying cloth on this cable?

A. Well, I asked some of the boys if there was any wire, to get some wire, that there was some of that little rope or twine in the car (shanty), that it was all right, and some said the wire was too big. I saw there was an old broom in there, and you can tear the old broom up and use the broom wire, either that or some of this binding twine. That is as far as I know. I do not know where they got the wire, in the shanty or where it came from.

Miss Cherie M. Gray, a stenographer, was called to St. Joseph's Hospital and took a statement from the plaintiff. It consisted of questions asked by Mr. VanNoy and answers given by the plaintiff (Qs. 953 to 963, p. 100). She testified:

1018 Q. I will ask you to refer to the transcript which you have identified before and I will ask you if on that occasion John O'Hara was asked this question by Mr. VanNoy: "Q. How did you happen to get injured, John?" and if in reply to that question John O'Hara did not state: "A. We were fixing that cable and looking for a piece of wire to wire some canvass on to the cable so we would not cut our hands on it and my uncle found this bit of wire and he cut the wire off and it had a little brass tube on the end of it. I had the brass tube and I wasn't doing anything so I tapped that little tube—it had yellow stuff in it, and I was knocking that powder out, or whatever it was, I don't know—I was tapping that thing and I turned it around and hit it on the other end and the thing went off." Was that question asked John O'Hara at that time and did he make that answer, Miss Gray?

A. Yes, I will say so (Q. 1022, p. 106).

1023 Q. I will ask you further by refreshing your recollection from this transcript whether John O'Hara was then asked by Mr. VanNoy this question, following the one which I have already read: "Q. It exploded?" and whether John O'Hara made this answer: "A. Yes, I was tapping the open end. One end was closed, and I was trying to get the powder out of it, and when I hit the closed end it went off." Was that question asked and did Mr. John O'Hara, the plaintiff, make that answer, Miss Gray, at that time?

A. Yes, I will say yes to that.

1025 Q. I will ask you if on that same occasion John O'Hara was asked by Mr. VanNoy this question: "Q. And it was full of powder?" and whether John O'Hara, the plaintiff, in answer to that question made this reply: "A. Some kind of yellow stuff. I don't know whether it was powder or not"?

A. That question was asked and answered that way.

1027 Q. I will ask you if on the same occasion John O'Hara, the plaintiff, was asked the following question by Mr. VanNoy: "Q. You say your uncle, E. W.

O'Hara, gave you this little copper tube?'' and if in reply John O'Hara made this answer: ''A. He cut the wire off and I took it, about the same as giving it to me. I went up after he cut it off and he held it in his hand.'' Was that question asked and that answer given by John O'Hara on that occasion, Miss Gray?

A. Yes, sir.

The plaintiff denied that he gave the above answers (Q. 155, p. 48).

O. B. Monahan, employed by the Dupont Powder Company, Wilmington, Delaware; A. E. Anderson, technical representative for the Dupont Powder Company; C. P. Beistle, chief chemist for the Bureau of Explosives, and who for six years was assistant chemist for the Bureau of Ordnance of the War Department, and H. A. Campbell, an inspector for the Bureau of Explosives, all qualified as experts and testified on behalf of the defendant. Each of these witnesses testified that he had had experience in handling explosives of various kinds and that he had handled and was familiar with the proper method of handling electric blasting caps such as the one the plaintiff exploded.

Mr. Beistle testified that (R., p. 134, Q. 1401):

''The regular blasting cap consists of a copper tube about a quarter of an inch in diameter and the usual size, the ordinary size is about an inch and a half long, and in the bottom of the copper tube there is about 15 grains of fulminate of mercury, and about 9/10ths of this is compressed to a solid mass in the bottom of the tube, and there is a small amount of loose fulminate placed on top of that, or it may be gun cotton in the loose form, and over this small amount of loose fulminate or gun cotton there is a small, what we call a bridge, it is a very fine platinum wire connecting the ends of the two wires that are run down into the tube through the open end, and these two wires pass through a composition plug, something like asphaltum, and this asphal-

tum plug sets on the loose fulminate, and through it pass these two wires in such a manner that they will not touch, and on top of this asphaltum plug there is a sulphur plug poured in on the material while it is hot so that as it cools it sets and seals the top of the cap so no moisture can penetrate, and these wires are inserted in this solid form of composition so that they are not easily taken out in rough handling."

Mr. C. P. Beistle made tests of the blasting caps "to see how much they would stand in rough handling." He made a device, a picture of which is shown at page 136, Exhibit 14, and with this appliance allowed a weight to strike the cap so as to indent the same at the loaded end, as shown by Exhibits 15, 17 and 18, at page 136 of the record. Mr. Beistle testified that he also "took some of these electric blasting caps that were packed ready for transportation, and we took a box up on top of a cliff and just threw the whole box over, and it fell down about forty feet and struck the rocks on the bottom and broke the wooden box all to pieces, and some of the paste-board cartons, or inside boxes were broken open, and many of the caps came out, but none were exploded" (R., p. 137, Q. 1419).

All of the expert witnesses testified that, in their opinion, an electric blasting cap could not be exploded in the manner in which the plaintiff testified he exploded the one in question. The experts also testified that the electric blasting caps such as the plaintiff was injured with are used commercially; that when the caps are furnished to the employee who is to use them the wires attached thereto are folded; that the men unfold the wires by "whipping" them out, and that in doing so they frequently strike hard substances and are subjected to blows similar to the blow which the plaintiff testified he accidentally gave the cap with which he was injured. That in all of their experience, ranging over many years, they never heard of a cap exploding from such a blow. They further testified that the electric blasting cap could not be exploded in ordinary handling or in

the manner plaintiff claimed; that while they would explode from concussion, it required a blow sufficient to indent the shell to explode the cap, and that exposure to sun, rain and weather generally will not affect their explosive character.

It was the duty of the Court to direct a verdict for the defendant, since the evidence did not support a finding for the plaintiff.

Dehning v. Detroit Bridge & Iron Works, 46 Neb. 556,
Hards v. Platte Valley Imp. Co., 46 Neb. 709,
Knapp v. Jones, 50 Neb. 490,
Harrison v. Stipes, 34 Neb. 431,
Anders v. Life Ins. Co., 62 Neb. 585,
Burke v. First National Bank of Pender, 61 Neb. 20,
Shiverick v. Gunning, 59 Neb. 73.

In *Brady v. C., St. P., M. & O. R. Co.,* 59 Neb. 233, it is held:

"Where there is no conflict in the evidence, and but one reasonable inference can be drawn from the facts, the question of negligence is for the court."

C., B. & Q. R. Co. v. Landauer, 36 Neb. 643,
Knapp v. Jones, 50 Neb. 490,
Schiverick v. Gunning, 58 Neb. 29,
Empire State Cattle Co. v. Railway Co., 210 U. S. 1, 10.

In *Western Mattress Co. v. Ostergaard,* 71 Neb. 575, the court says:

"When an allegation of negligence is unsupported by any competent testimony, it should not be given in an instruction to the jury."

On page 577 the court says:

"While negligence is alleged in the petition because of this failure, yet the testimony wholly fails to support this allegation of the petition, and, being wholly unsupported by competent evidence, it should not have been submitted to the consideration of the jury."

The evidence does not show that the injury sued for was proximately attributable to the acts and omissions relied upon by the plaintiff in his amended petition.

In *St. Louis & San Fran. R. R. Co. v. Conarty,* 238 U. S. 243, it appeared that the injuries sued for "were received in a collision between a switch engine and a loaded freight car having no coupler or drawbar at one end, these having been pulled out while the car was in transit. * * * The deceased and two companions were standing on the footboard at the front of the switch engine and when the car was observed his companion stepped to the ground on either side of the track, while he remained on the footboard and was caught between the engine and the body of the car at the end from which the coupler and drawbar were missing. Had these appliances been in place they, in one view of the evidence, would have kept the engine and the body of the car sufficiently apart to have prevented the injury, but in their absence the engine came in immediate contact with the sill of the car with the result stated * * *." On page 249 the court says:

> "The principal question in the case is whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with it would have not have resulted in injury to the deceased. It therefore is necessary to consider with what purpose couplers and drawbars of the kind indicated are required, for where a duty is imposed for the protection of persons in particular situations or relations a breach of it which happens to result in injury to one in an altogether different situation or relation is not as to him actionable * * *."

The foregoing principles are applicable to the present case. The failure to provide wire and the direction of the foreman to procure it was not likely to result in injury to any one. Neither was the failure of the foreman to inspect the wire after it was found. When the purpose for which the wire was desired is considered, it is plain that an injury was not likely to result from the failure to inspect it.

In *Pryor v. Williams,* 254 U. S. 43, it appears that the plaintiff was directed to use a clawbar, a defect in which caused it to slip and the plaintiff to lose his balance and fall to the ground, twelve feet below. "The conclusion of the trial court was that, 'The defect in the clawbar was so obvious that the most cursory and superficial inspection would have disclosed it to the plaintiff'. And further, 'The risk was just as obvious as the defect. This was a simple tool, which, in the course of use, would be expected to fall into such defective condition, and plaintiff must be held to have appreciated the danger and to have voluntarily assumed it'."

The Supreme Court of Missouri reversed the judgment, but this court sustained the conclusion of the trial court hereinbefore set out.

In *Lang v. New York Cent. R. R. Co.,* 255 U. S. 455, it is said:

> "Failure of a railroad to equip a car with automatic couplers as required by the Safety Appliance Act will not render it liable to an employee for an injury of which the delinquency was not the proximate cause."

This was an action for personal injuries resulting as follows:

> "A car without a drawbar or coupler was standing on the siding. The plaintiff's intestate was a brakeman and was riding on a second car kicked upon the same siding. A collision occurred and the deceased was

crushed between the car upon which he was riding and the defective car."

The defendant contended:

"The proximate cause of the accident was the failure of the deceased to stop the cars before they came into collision with the defective car. The absence of the coupler and drawbar was not the proximate cause of the injury, nor was it a concurring cause."

On page 461 the court says:

"The movement of the colliding car was in the daytime and the situation of the defective car was not only known and visible, but its defect was known by Lang. He, therefore, knew that his attention and efforts were to be directed to prevent contact with it. He had no other concern with it than to avoid it. 'It evidently was not,' the trial court said, 'the intention of any of the crew * * * to disturb * * * the crippled car.' It was the duty of the crew, we repeat, and immediately the duty of Lang, to stop the colliding car and to set the brakes upon it 'so as not to come in contact with the crippled car,' to quote again from the trial court. That duty he failed to perform, and, if it may be said that, notwithstanding, he would not have been injured if the car collided with had been equipped with drawbar and coupler, we answer, as the Court of Appeals answered, still 'the collision was not the proximate result of' the defect. Or, in other words, and as expressed in effect in the *Conarty Case,* that the collision under the evidence cannot be attributable to a violation of the provisions of the law 'but only that had they been complied with it (the collision) would not have resulted in the injury to the deceased'."

See also *State v. Ellison,* 196 S. W. 1088 (Supreme Court of Missouri), in which it is said:

"A negligent act does not proximately cause an injury which could not have been reasonably anticipated."

In *Great Northern Ry. Co. v. Wiles,* 240 U. S. 444, 36 Sup. Ct. Rep. 406, the Court says (we quote from the syllabus in the Supreme Court Reporter):

> "There is no room for the application of the rule of comparative negligence established by the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 25, Chap. 149, Comp. Stat. 1913, Section 8657), where the rear brakeman of a parted freight train, disregarding his duty to protect the rear of his train by going back a short distance and giving the warning signals which the carrier's rules required, remained in the caboose and was killed there when a passenger train, which he knew was closely following, ran into the standing train, since his was the causal negligence, even if negligence could be imputed to the carrier from the pulling out of the drawbar which caused the train to break in two, there being no claim that the passenger train was negligently run."

In *Milwaukee, etc. Ry. Co. v. Kellogg,* 94 U. S. 469, the court holds:

> "A finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, is not warranted, unless it appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances * * *."

See also—

McGill v. Michigan S. S. Co., 144 Fed. 788 (C.C.A., 9th Cir.), (Writ of Certiorari denied, 203 U. S. 593),
Western Union Telegraph Co. v. Hall, 287 Fed. 297,
Bryant v. Beebe & Runyan Furniture Co., 78 Neb. 155,
Kitchen v. Carter, 47 Neb. 776,
Merkouras v. C., B. & Q., 101 Neb. 717,
Williams v. Hines, 109 Neb. ——, 189 N. W. 623. 624.

"A party is only answerable for the natural, probable, reasonable and proximate consequences of his acts; and

where some new efficient cause intervenes not set in motion by him and not connected with, but independent of, his acts, not flowing therefrom and not reasonably in the nature of things to be contemplated or foreseen by him and produces the injury, it is the proximate and dominant cause."

Kitchen v. Carter, 47 Neb. 766.

In proceedings brought under the Federal Employers' Liability Act, "rights and obligations depend upon it and applicable principles of common law as interpreted and applied by the federal courts; and negligence is essential to recovery." *New Orleans & N. E. R. R. Co. v. Harris,* 247 U. S. 367. At page 371 in the Harris case the court says:

"The federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. *The Nitro-Glycerine Case,* 15 Wall. 524, 537; *Patton v. Texas & Pac. Ry. Co.,* 179 U. S. 658, 663; *Looney v. Metropolitan R. R. Co.,* 200 U. S. 480, 487; *Southern Ry. Co. v. Bennett,* 233 U. S. 80, 85. In proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts; and negligence is essential to recovery. *Seaboard Air Line Ry. v. Horton,* 233 U. S. 492, 501, 502; *Southern Ry. Co. v. Gray,* 241 U. S. 333, 339; *Erie R. R. Co. v. Winfield,* 244 U. S. 170, 172; *New York Central R. R. Co. v. Winfield,* 244 U. S. 147, 150. These established principles and our holding in *Central Vermont Ry. Co. v. White,* 238 U. S. 507, 511, 512, we think, make it clear that the question of burden of proof is a matter of substance and not subject to control by laws of the several states."

The *Nitro-Glycerine Case,* 15 Wall. 524, cited approvingly by the court in the Harris case, was an action for damages caused by the explosion of nitro-glycerine while employees of an express company were opening the case containing it, to repair a leak therein. They did not know

what it was or that it was dangerous. The court held that there was no liability. At page 536 the court says:

> "The defendants, being innocently ignorant of the contents of the case, received in the regular course of their business, were not guilty of negligence in introducing it into their place of business and handling it in the same manner as other packages of similar outward appearance were usually handled. 'Negligence' has been defined to be 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances.
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> * * * * * * * *
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> "Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer of his misfortune."

In *Cleghorn v. Thompson*, 62 Kans. 727, 64 Pac. 605, the court quotes approvingly from *Pollock on Torts* as follows:

> "'Where a man, proceeding in a lawful business, exercises reasonable care, the law does not make him an insurer of others against those consequences of his actions which reasonable care and foresight could not have prevented. The law justly ascribes such consequences to inevitable misfortune or to the act of God, and leaves the harm resulting from them to be borne by him upon whom it falls. The contrary rule would obviously be against public policy, because it would im-

pose so great a restrain upon freedom of action as materially to check human enterprise'."

In the same opinion the court quotes approvingly as follows from *Thompson on Negligence:*

"'It is conceded by all the authorities that the standard by which to determine whether the person has been guilty of negligence is the conduct of the prudent, careful, diligent, or skillful man in the particular situation'."

In *Southern Pacific Co. v. Berkshire,* 254 U. S. 415, the court says:

"In this case the question is not whether a reasonable insurance against such misfortunes should not be thrown upon the traveling public through the railroads, or whether it always is possible for a railroad employee to exercise what would be called due care for his own safety and to do what he is hired to do. The question is whether the railroad is liable under the statute according to the principles of the common law regarding tort. * * * When a railroad is built, it is practically certain that some deaths will ensue, but the builders are not murderers on that account when the foreseen comes to pass. On the common-law principles of tort the adoption of an improvement in the public interest does not throw the risk of all incidental damage upon those who adopted it, however fair it may be to put the expenses of insurance upon those who use it * * *."

It is obvious that an accident such as befell the plaintiff could not have been anticipated from the failure to have a supply of wire on hand; it is obvious that such an accident could not have been anticipated from complying with the order of the foreman to get wire, and it is also obvious that such an accident could not have been anticipated from the failure of the foreman to inspect a piece of wire to be used to tie a cloth to a cable.

Pryor v. Williams, 254 U. S. 43,
Vanderpool v. Partridge, 79 Neb. 165.

The plaintiff knew that he had two fragments of wire, too short to use, with something attached to the ends thereof. He had not been directed to use any such appliance, either by the foreman or by E. W. O'Hara, and there is no testimony in the record showing "that it was negligently given to him as a part of the tools and materials with which he was supplied for his said work," as alleged in the petition. If he was, in fact, trying to straighten the wire when he was injured it is plain that the wire had not been furnished him for the purpose alleged in his petition. E. W. O'Hara did not give him the wire either to use or straighten, and he was in no different position than if he had found it himself and undertaken to straighten it. There is nothing in the record to show that E. W. O'Hara knew, or should have known that the plaintiff intended to straighten the wire attached to the cap, or to make any use of it in connection with the work. The record affirmatively shows to the contrary, for E. W. O'Hara testified that he was about to throw the cap away after he severed it from the wires and had no further use for it. Under the circumstances disclosed by the evidence, E. W. O'Hara could not have supposed that the plaintiff intended to make any use out of the cap, or the small fragment of wire attached thereto. He did not "furnish" him the wire to tie the cloth with and the plaintiff's own testimony so shows, as well as the testimony of E. W. O'Hara.

Nor is the evidence sufficient to establish any negligence on the part of E. W. O'Hara in complying with the plaintiff's request to give him the cap. E. W. O'Hara had never seen such a cap and did not know what it was. He could have anticipated no harmful consequence from handing to the plaintiff a cap which he himself had roughly handled without injury.

When the plaintiff undertook to handle a foreign article, he assumed the risks incident thereto. He was a mere volunteer when he asked for and received the cap and exploded it.

It was the cap and not the wire that the plaintiff desired. If E. W. O'Hara had been in the act of throwing aside such a fragment of wire without a cap attached thereto, it is plain that the plaintiff would not have gone to the trouble to pick it up or straighten it, but would have understood from the fact that his uncle was discarding it that it was not fit for use. According to the plaintiff's own testimony, he stood idly by watching the other men until he saw the cap. Until that time, he had not made any effort to search for wire or to help tie the cloths to the cable. The record discloses that the plaintiff was not acting within the course or scope of his employment when he was injured. The record fails to show any actionable negligence on the part of the defendant or his agents. The record does show that the plaintiff knew as much about the dangers incident to the work as any of the other men, and he, therefore, assumed the risk.

Pryor v. Williams, 254 U. S. 43.

Assumption of risk is a complete defense to actions brought under the Federal Employers' Liability Act, except where the negligence of the carrier is in violation of some statute enacted for the safety of employees. *Jacobs v. Southern Railroad,* 241 U. S. 229; *Boldt v. Pa. R. Co.,* 245 U. S. 441.

E. W. O'Hara cannot be imputed with knowledge of the fact that the cap was dangerous without also imputing such knowledge to the plaintiff. The plaintiff was not injured from any act on the part of E. W. O'Hara, but was injured, according to his testimony, by accidentally striking the cap against the rail.

The evidence does not show that the plaintiff when injured was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

The undisputed evidence showed that the gantry was supplied with the usual number of ropes and chains on the day of the accident (Rec., pp. 85 to 87, Qs. 704 to 740).

The men were making the sling for handling lumber, poles, or any other wood. They had no sling prior to the accident (Rec., p. 88, Qs. 753 and 754). They were making the sling out of a piece of cable they had in the tool house (Rec., p. 88, Q. 759). The sling was not to be permanently attached to the gantry, but was to be used the same as the chains and ropes with which the gantry was supplied were used (Rec., p. 89, Qs. 771 to 775). The sling was not completed before the accident, and they did not transfer any more cars until two days after the accident, or until September 15th. They did not use the sling in transferring them. They started transferring a car of poles on September 15th and finished it on the 16th and did not use the sling for that purpose (Rec., p. 90, Qs. 775 to 793).

The plaintiff was not engaged in interstate commerce, even if he were assisting the men in making this sling when he was injured, which we deny. The sling which the men were making was a new appliance and had not been devoted to commerce of any kind at the time of the accident. Under the circumstances, the men engaged in making the sling were not engaged in interstate commerce any more than a blacksmith would have been had he been making the sling in question in his own shop.

Industrial Accident Commission of State of California, et al, v. Payne, Agent, 42 Sup. Ct. 489, and cases cited therein.

We believe that the District Court of Douglas County, Nebraska, was without jurisdiction; that the federal right

to exemption from suit in that county was consistently urged at every appropriate stage of the proceedings in exact compliance with previously settled rules of local practice; that that right was not and could not by its assertion be waived; and that the court erred in permitting the substitution of the petitioner as the defendant in said action. If we are correct in these contentions, it will, of course, be unnecessary for the court to pass upon the other questions involved; but if the court finds it necessary to pass upon such questions, we believe it should hold that the evidence does not sustain the verdict for the reasons hereinbefore stated.

Respectfully submitted,

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